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No. 87-526

Supreme Court, U.S.

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In The  
**Supreme Court of the United States**

October Term, 1987

—o—  
BOBBY FELDER,

*Petitioner,*

v.

DUANE CASEY, *et al.*,

*Respondents.*

—o—  
**ON WRIT OF CERTIORARI  
TO THE WISCONSIN SUPREME COURT**

—o—  
**REPLY BRIEF FOR PETITIONER**

—o—  
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## ARGUMENT

# I. THE WISCONSIN NOTICE OF CLAIM REQUIREMENT CONFLICTS WITH THE ESSENTIAL NATURE OF THE § 1983 CAUSE OF ACTION AND BURDENS THE LITIGATION OF § 1983 CLAIMS IN THE WISCONSIN COURTS.

## A. State Courts That Entertain § 1983 Actions May Not Impose State Policies That Conflict With The Essential Nature Of The § 1983 Cause Of Action.

In arguing for the application of notice of claim requirements to state court § 1983 litigation, the respondents do not dispute that state courts that entertain § 1983 action must hear the entire federal cause of action with all its essential attributes.<sup>1</sup> Rather, they label the Wisconsin notice of claim statute, Wis. Stat. Ann. § 893.80 (West 1983 & Supp. 1986) (hereinafter cited as "§ 893.80"), as "a simple procedural requirement" and argue that the requirement is liberally construed by the Wisconsin courts, routinely complied with by claimants, and in furtherance of a legitimate public interest.<sup>2</sup> Brief for Respondents at 3.

<sup>1</sup>Respondents' position is supported by three amici curiae briefs, including one filed by the International City Management Association and six other organizations of state, county and municipal governments and their officials. In responding to the arguments in this amici brief, petitioner will refer to these amici as the "City Management amici" and to their brief as the "City Management Amici Brief."

<sup>2</sup>The City Management amici concede that state policies may not regulate or control essential or central attributes of § 1983 but argue that state policies should be followed on "procedural" matters. City Management Amici Brief at 21. They then classify some "procedural" matters as "quasi-procedural" (i.e., choice of statutes of limitations) and argue that federal law controls these issues, see *id.* at 18, 22, but that state law controls "procedural" matters like notice of claim requirements. They never explain, however, the difference between "quasi-procedural" and "procedural" policies or why limitations periods are "quasi-procedural" but notice of claim requirements are not. This use of labels is of little assistance to courts that must decide cases.

This description, even if accurate, does not support the use of notice of claim requirements in state court § 1983 litigation. Section 1983 is a remedial statute intended to be "independently enforceable whether or not it duplicates a parallel state remedy." *Wilson v. Garcia*, 471 U.S. 261, 279 (1985). Congress enacted § 1983 during Reconstruction because of the ineffectiveness of state remedies, and *Wilson*, *Patsy v. Board of Regents of the State of Fla.*, 457 U.S. 496 (1982), and *Martinez v. California*, 444 U.S. 277 (1980), establish the essential features of § 1983 that apply in state and federal courts.

Respondents maintain that the Wisconsin notice of claim requirement does not operate as a statute of limitations because § 1983 plaintiffs may provide "actual notice" beyond the 120-day statutory period and need only submit an "itemized statement of the relief sought" under § 893.80(1)(b) in sufficient time to commence an action within the statute of limitations. Brief for Respondents at 22. This conclusion, however, ignores the fact that plaintiffs who fail to provide timely statutory notice have the burden of showing that the late notice was not prejudicial to either the governmental entity (regardless whether it is a litigant) or to any employees named as defendants. *Id.* at 5. Thus, plaintiffs in Wisconsin who do not provide timely statutory notices no longer have an unqualified right to bring § 1983 actions in the state courts. Moreover, even flexible notice of claim requirements that permit extensions of the time period operate as statutes of limitations.<sup>3</sup> See *Murray v. City*

<sup>3</sup>The close relationship between notice of claim requirements and statutes of limitations is apparent from a review of the 38 notice of claim statutes cited in the City Management Amici Brief, at 1a-2a. Approximately two-thirds of the statutes cited require notices to be filed within six months or less of the complained-of incident. However, in only five of the jurisdictions, including Wisconsin, does the cited statute contain a general provision permitting the late filing of notices. See Cal. Gov't Code § 911.4 (West 1980 & Supp. 1988); Me. Rev. Stat.

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of New York, 30 N.Y.2d 113, 121, 282 N.E.2d 103, 108, 331 N.Y.S.2d 9, 16 (1972) (Breitel, J., concurring) ("[T]he [notice of claim] statute is a harsh one and has the effect of a very short Statute of Limitations.'").

The application of the Wisconsin notice of claim requirement to injunctive and damage actions against mu-

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Ann. tit. 14, § 8107 (1980); N.J. Stat. Ann. § 59:8-9 (West 1982); N.Y. Gen. Mun. Law § 50-e (McKinney 1986). Cf. Utah Code Ann. § 63-30-11 (1986 & Supp. 1987) (permitting late filing but only for minors, prisoners, and mentally incompetent persons without guardians). The New Jersey and New York statutes permit late filing but place the burden of showing good cause or otherwise justifying the late filing on the plaintiff and expressly give their courts discretion as to whether to accept late notices. See N.J. Stat. Ann. § 59:8-9 (West 1982); N.Y. Gen. Mun. Law § 50-e(5) (McKinney 1986). In California, the public body that is the target of the claim may grant leave to file a late claim, see Cal. Gov't Code § 911.6 (West Supp. 1988), although the courts also have discretion to extend the time. See Cal. Gov't Code § 946.6(a) & (e) (West Supp. 1988). See also *Dunston v. State*, 161 Cal. App.3d 79, 83, 207 Cal. Rptr. 196, 198 (1984).

State courts often have broad discretion to extend the time for filing notices. For example, the New York Court of Appeals has attributed the apparent inconsistencies among the many lower court decisions to the traditional reluctance of appellate courts to review exercises of discretion. See *Murray v. City of New York*, 30 N.Y.2d 113, 119, 282 N.E.2d 103, 107, 331 N.Y.S.2d 9, 14 (1972). See also Richland, *Municipal Law: Government Mousetraps and Attorney Malpractice*, N.Y.L.J., at 1, col. 1 (Dec. 9, 1987) (noting the more than 140 pages of annotations summarizing cases construing the New York notice of claim requirement).

One state addresses these issues by making compliance with its notice of claim statute truly voluntary and attaches no sanctions to the failure to file notices, see N.H. Rev. Stat. Ann. § 541-B:14 (1974 & Supp. 1986), and one state simply delegates to local government the authority to adopt notice of claim requirements. See Del. Code Ann. tit. 10, § 4013 (Supp. 1986).

The remaining statutes do not contain any language authorizing late claims, and one commentator has noted that "courts will generally be more insistent upon compliance with time deadlines than with other elements of notice." W. Valente, *Local Government Law* 907 (1980).

municipalities and their employees<sup>4</sup> and the use of the 120-day waiting period make the statute resemble an impermissible exhaustion requirement. The 42d Congress, however, did not contemplate that plaintiffs would be *required* to resort to state remedies, including state administrative remedies,<sup>5</sup> and this Court in *Burnett v. Grattan*,

<sup>4</sup>Even if Wisconsin can apply its notice of claim requirement to state court § 1983 litigation against municipalities, the state interests advanced by respondents do not justify the use of notice of claim requirements in § 1983 actions against municipal employees. In this case, the respondents, all of whom are City of Milwaukee police officers, were sued in their individual and official capacities. See Plaintiff's Second Amended Complaint, para. 10. (J.A. 11). The § 1983 claim against the respondents in their official capacities is the equivalent of a suit against the municipality, see *Brandon v. Holt*, 469 U.S. 464 (1985), but even if that claim must be dismissed, the § 1983 claim against the respondents in their individual capacities should not be.

In addition to Wisconsin, only ten of the 38 notice of claim statutes cited in the City Management Amici Brief (at 1a-2a) expressly require notices to be served on governmental entities in actions brought only against the employees. See Ariz. Rev. Stat. Ann. § 12-821 (Supp. 1987); Colo. Rev. Stat. § 24-10-109 (Supp. 1987); Idaho Code § 6-906 (Supp. 1987); Md. Cts. & Jud. Proc. Code Ann. § 5-404 (1984 & Supp. 1987); Minn. Stat. Ann. § 466.05 (West 1977 & Supp. 1988); Neb. Rev. Stat. § 23-2416.01 (Supp. 1987); N.Y. Gen. Mun. Law § 50-e (McKinney 1986); Or. Rev. Stat. § 30.275 (1984 & Supp. 1987); S.C. Code Ann. § 15-78-70(c) (Law. Co-op Supp. 1987); Utah Code Ann. § 63-30-11 (1986 & Supp. 1987). None of these statutes, however, go as far as Wisconsin's and require notices of claim to be served on *both* the governmental entity and the employees in suits only against the employees. But see *Poole v. Clase*, 476 N.E.2d 828, 831 (Ind. 1985) (construing Indiana law to require such notice).

<sup>5</sup>In applying the notice of claim requirement to state court § 1983 actions, the Wisconsin Supreme Court relied heavily on *Kramer v. Horton*, 128 Wis.2d 404, 383 N.W.2d 54, cert. denied, 107 S.Ct. 324 (1986), in which it had rejected the application of *Patsy v. Board of Regents of the State of Fla.*, 457 U.S. 496 (1982), to state court § 1983 litigation. In an effort to explain away that questionable reading of *Patsy*, the City Management amici suggest that the "'no exhaustion' rule . . . [may be] more aptly considered simply part of the procedural background of adjudication in the federal court." City Management Amici Brief at 24. That conclusion, however, is erroneous, as the well established rule in federal court requires the exhaustion

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468 U.S. 42, 50 (1984), observed that the "dominant characteristic" of § 1983 actions is that "they belong in court."

Notice of claim requirements are also used to limit the liability of local governments and their employees. Respondents and the City Management amici effectively admit this by identifying various fiscal-related justifications for notice of claim requirements. See Brief for Respondents at 12; City Management Amici Brief at 28. Moreover, notice of claim requirements are part of legislative attempts to limit the extent of governmental liability, especially in light of the judicial abrogation of governmental immunity. The mere fact that the requirements only limit rather than preclude liability does not alter their character as state immunity policies.

In arguing for the use of notice of claim requirements in state court § 1983 litigation, the City Management amici rely on Professor Hart's observation that "federal law takes the state courts as it finds them." City Management Amici Brief at 8-9 (quoting Hart, *The Relations Between State and Federal Law*, 54 Colum. L. Rev. 489, 508 (1954)). This statement, which was adapted from the concurring opinion in *Brown v. Gerdes*, 321 U.S. 178, 190 (1944) (Frankfurter, J., concurring), has never been adopted by this Court, and *Gerdes* rejected the suggestion that state courts that voluntarily entertained suits asserting rights under federal statutes "could take jurisdiction of them but fail to apply any federal law in which those claims might be rooted." 321 U.S. at 186. Moreover, Professor Hart also cautioned that state rules need not be applied when they are "so rigorous as, in effect, to nullify the asserted rights." See Hart, *supra*.

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of adequate and available administrative remedies. See *McKart v. United States*, 395 U.S. 185, 193 (1969); *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1938). See also *Patsy*, 457 U.S. at 518 (White, J., concurring). Only the nature of § 1983 and its unique legislative history support the rejection of exhaustion of administrative remedies requirements in § 1983 litigation.

Petitioner does not dispute the ability of state courts to apply the ordinary rules of practice and procedure in cases involving federal rights. See *John v. Paullin*, 231 U.S. 583, 585 (1913) (upholding the use of state rules for invoking the appellate jurisdiction of state courts). For example, when Congress adopts a set of rules or procedures that are uniquely designed to govern litigation in the federal courts, state courts need not follow them. *Peaches v. City of Evansville*, 180 Ind. App. 465, 468, 389 N.E.2d 322, 325 (1979) (state courts entertaining § 1983 actions need not follow the Federal Rules of Evidence), *cert. denied*, 444 U.S. 1033 (1980).

The history of FELA litigation makes clear that state courts entertaining federal causes of action are often prohibited from following state policies that could be characterized as "procedural." See, e.g., *Dice v. Akron, C. & Y. R.R.*, 342 U.S. 359 (1952); *Wilkerson v. McCarthy*, 336 U.S. 53 (1949); *Garrett v. Moore-McCormack Co.*, 317 U.S. 239 (1942). Cf. *Southland Corp. v. Keating*, 465 U.S. 1, 15-16 (1984). Nor may state courts reject matters governed by uniform federal common law. *Norfolk & W. Ry. v. Liepelt*, 444 U.S. 490 (1980); *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502 (1962).

In arguing that state courts may apply state "procedural" policies when entertaining § 1983 claims, respondents identify a number of state policies that state courts should be able to follow. See Brief for Respondents at 17 n.2 (describing policies on service, substitution of parties, failure to prosecute, and failure to comply with procedural or court rules). These policies, however, are all counterparts of federal policies that not only are uniquely applicable to federal court but also are essential for regulating the conduct of litigation. See *Brown v. United States*, 742 F.2d 1498, 1506 (D.C. Cir. 1984) (en banc), *cert. denied*, 471 U.S. 1073 (1985). Notice of claim requirements, however, are conditions precedent to sue and have little in common with policies that regulate the actual conduct of litigation.

In addition, each of the "procedural" policies identified by the respondents is a general policy equally applicable in suits against *both* governmental and private defendants. Notice of claim requirements, on the other hand, provide special protections *only* to governmental defendants. This Court, however, has taken care to protect § 1983 plaintiffs from facially neutral state policies that benefit prospective defendants. For example, *Wilson v. Garcia*, 471 U.S. 261, 279 (1985), rejected the use of state tort claims acts for selecting the appropriate statute of limitations. Further, to assure that states not discriminate against § 1983 claims, *Wilson* required the use of the statute of limitations for general personal injury actions.<sup>6</sup> *Id.* Thus, respondents' case is significantly weakened because of Wisconsin's decision not to make its notice of claim requirement applicable to all civil litigation.<sup>7</sup>

The Wisconsin notice of claim requirement does not discriminate against § 1983 claims in the sense of treating § 1983 claims differently than state law claims against the same defendants. Nonetheless, the use of notice of claim requirements to protect those governmental defendants most likely to be defendants in § 1983 litigation has the impact of burdening § 1983 claims by tying § 1983 to state law remedies whose "ineffectiveness . . . led

<sup>6</sup>The only full opinion by any federal appellate court supporting the use of notice of claim requirements in § 1983 litigation was the dissenting opinion in *Brown v. United States*, 742 F.2d at 1510. *Brown*, however, was decided prior to *Wilson*, and thus at a time when a strong argument could be made for looking to state tort claims acts for the appropriate limitations period.

<sup>7</sup>The City Management amici suggest that the rejection of notice of claim requirements in state court § 1983 litigation would preclude states from requiring mediation or non-binding arbitration in civil damage actions. City Management Amici Brief at 23. Such alternative dispute resolution requirements, however, would presumably differ from the Wisconsin notice of claim requirement in that the former would be applicable to *all* civil litigation and not only to those defendants most likely to be defendants in § 1983 actions, namely, governmental entities and their employees.

Congress to enact the Civil Rights Acts in the first place.” *Wilson*, 471 U.S. at 279.<sup>8</sup>

**B. Regardless Of The Applicability Of § 1988 To State Courts, The Wisconsin Notice Of Claim Requirement Impermissibly Burdens The State Court Litigation Of § 1983 Claims.**

Respondents and the City Management amici argue that 42 U.S.C. § 1988 does not require the rejection of notice of claim requirements in state court § 1983 litigation. Petitioner, however, contends that § 1988 does apply in state courts, but, whether or not it does,<sup>9</sup> the

<sup>8</sup>The only state courts of last resort to address this issue since the decision in this case have rejected the decision below and unanimously held that state notice of claim requirements do not apply to § 1983 claims as a matter of federal law. See *Mellinger v. Town of West Springfield*, 401 Mass. 188, 515 N.E. 2d 584, (1987); *Fuchilla v. Layman*, — N.J. —, — A.2d — (Feb. 8, 1988), *aff'g* 210 N.J. Super. 574, 510 A.2d 281 (App. Div. 1986).

<sup>9</sup>The City Management amici suggest that this Court's reliance on § 1988 in *Sullivan v. Little Hunting Park*, 396 U.S. 229 (1969), a state court proceeding under 42 U.S.C. § 1982, was dictum because the conclusion about damages could have been supported on the ground that § 1982 itself requires the use of federal damage principles. City Management Amici Brief at 19 n.19. Petitioner agrees that federal law supports the use of uniform federal damage policies in § 1982 and § 1983 cases, whether brought in state or federal court. It is a novel use of the concept of dictum, however, to suggest that this Court's conclusion was dictum because the Court could have reached the same result by alternative means. Moreover, the damage issues were an important aspect of *Sullivan*. This Court had held in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968), that § 1982 prohibited private discrimination in matters affecting property. Section 1982 did not contain any express remedies, and *Jones* left open whether damages were available. *Id.* at 414 n.14. The *Sullivan* Court relied on *Bell v. Hood*, 327 U.S. 678 (1946), to conclude that a federal damage remedy could be implied from the federal statute rather than from the law of the forum state. The petitioner in *Sullivan* sought guidance as to the available damages, see Petitioner's Brief at 50-54, and this Court explicitly relied on § 1988 to provide the Virginia state courts and the litigants with such guidance. Subsequent decisions of this Court may have undercut *Sullivan's* open-ended approach to damage issues and the role it assumed for the dam-

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approach followed under § 1988 should also be applicable to state court § 1983 litigation.

In determining whether to apply state policies in § 1983 litigation, courts applying § 1988 follow a three-step inquiry. *Burnett v. Grattan*, 468 U.S. 42, 47-48 (1984). Initially, courts must determine whether there is a deficiency or gap in federal law. If they find a deficiency, then they must consider whether a particular state policy is appropriate for borrowing in light of the purposes of § 1983. Finally, courts must address the closely related question of whether the borrowed policy is consistent with the purposes of § 1983.

These inquiries should also be made in state court § 1983 litigation. Regardless whether § 1988 applies in state courts, state courts must still define the federal cause of action and determine whether federal law is deficient. Obviously, state courts cannot apply federal policies that are only applicable in federal court (i.e., the federal rule on class actions and the federal statute on postjudgment interest), and therefore, state courts may apply § 1988 somewhat differently from federal courts. Nonetheless, state courts entertaining § 1983 actions may only use state policies that are “appropriate.” *Cf. Wilson v. Garcia*, 471 U.S. 261, 265-66 (1985) (rejecting the New Mexico Supreme Court selection of the appropriate limitations period).

Likewise, at the third step, state and federal courts (whether applying § 1988 or federal common law principles) should reject state policies that are inconsistent with § 1983. In making this inquiry, however, courts are not limited to rejecting state policies that only violate specific federal constitutional or statutory provisions. If that were the only question, the inconsistency clause of § 1988 would have little meaning. Rather, the inquiry is

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age policies of the forum state, see *Memphis Community School Dist. v. Stachura*, 477 U.S. 299 (1986); *Carey v. Piphus*, 435 U.S. 247 (1978), but that does not detract from the conclusion that § 1988 applies in state courts.

broadened and requires courts to look for a conflict between state policies and the purposes of § 1983. See *Robertson v. Wegmann*, 436 U.S. 584, 590-91 (1978).

In examining the consistency of state policies with the purposes of § 1983, the inquiry is not confined to whether the plaintiff wins or loses. See *Robertson*, 436 U.S. at 593. Likewise, the consistency of a particular state policy with the purposes of § 1983 or its appropriateness in § 1983 litigation should not depend simply on whether the plaintiff might have been able to comply with the state policy. Rather, the inquiry should focus more broadly on the appropriateness of the particular policy in § 1983 litigation, and, in the case of state court litigation, on whether the state policy is either inconsistent with the purposes of § 1983 or burdens state court § 1983 litigation.<sup>10</sup>

In defending the application of the Wisconsin notice of claim requirement to state court § 1983 litigation, respondents contend that the requirement is a simple procedural condition on suit which is liberally construed by Wisconsin courts. A review of Wisconsin cases, including this case, however, suggests otherwise. As the trial court noted, there are both liberal and strict applications of the notice of claim requirement, see Dec. 6-8 (Mar. 8, 1985), and a common thread is the absence of clear standards to guide lower courts and litigants. See *Olsen v. Township of Spooner*, 133 Wis.2d 371, 379, 395 N.W.2d 808, 811 n.4 (Wis. App. 1986) (observing that "[o]pinions applying sec. 893.80(1)(a) have typically treated the prejudice question summarily, listing facts, then declaring whether these facts supported a finding of prejudice"),

<sup>10</sup>In *Board of Regents v. Tomanio*, 446 U.S. 478, 489-92 (1980), this Court reviewed considerations of federalism and uniformity in refusing to reject a borrowed state tolling policy. Considerations of federalism and the equitable administration of the law, however, require the rejection of state policies that burden state court § 1983 litigation and support the construction of § 1983 similarly in state and federal courts.

review denied, 134 Wis.2d 458, 401 N.W.2d 10 (1987). Moreover, the statute is often strictly applied. For example, the requirement of an "itemized statement of the relief sought" in § 893.80(1)(b), see *Gutter v. Seamandel*, 103 Wis.2d 1, 308 N.W.2d 403 (1981); *Pattermann v. City of Whitewater*, 32 Wis.2d 350, 145 N.W.2d 705 (1966), may be more difficult to meet than the applicable state and federal rules on pleading damages, neither of which limit plaintiffs to the amount of damages specifically pleaded in their prayer for relief. See Fed. R. Civ. P. 54(c); Wis. Stat. Ann. § 806.01(1)(c) (West 1977).

The most effective rebuttal of respondents' assertions about the liberal construction of the Wisconsin notice of claim requirement, however, is the present case. High level officials of the City of Milwaukee were aware of Bobby Felder's arrest and alleged beating within hours of the incident and initiated an investigation. The Wisconsin Supreme Court without reaching whether the failure to provide a statutory notice was prejudicial found that there was no "actual notice" within the meaning of the statute.<sup>11</sup>

Respondents also contend that petitioner could have easily filed a notice of claim after the respondent raised the issue.<sup>12</sup> Brief for Respondents at 10. A review of

<sup>11</sup>Even if the notice of claim requirement may generally be applied to § 1983 cases, its use in this case does not constitute an adequate state ground to support the dismissal of petitioner's § 1983 action. See Brief for Petitioner at 38-40.

<sup>12</sup>In cases involving allegations of police misconduct, criminal charges are often brought against the eventual § 1983 plaintiff. See *Police Misconduct: Law and Litigation* § 8.2(a) (Clark Boardman Co., Ltd. 1987). Although plaintiffs may not be barred from commencing § 1983 damage actions while such charges are pending, cf. *Deakins v. Monaghan*, 108 S.Ct. 523 (1988), it is not realistic to expect plaintiffs to initiate civil actions until the closely related criminal or other charges are resolved. In the present case, for example, the city ordinance disorderly conduct citation against the petitioner was not dismissed by the Milwaukee City Attorney's Office until January 12, 1982, more than six months after the incident that led to

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the proceedings below, however, places this suggestion in its proper context. Although the respondents did raise the notice of claim issue as an affirmative defense,<sup>13</sup> they made no motions concerning that defense within the time limitations of the scheduling order. When they finally moved to dismiss the action for non-compliance with the notice of claim requirement in a motion filed on Friday, February 22, 1985, ten days before trial, see Tr. 3 (Feb. 25, 1985), it was too late for the petitioner to provide the requisite notice and still give the city 120 days to consider his claim without jeopardizing the scheduled trial.<sup>14</sup>

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this action. See Plaintiff's Second Amended Complaint, para. 34 (J.A. 19). Thus, by the time this obstacle to initiating a § 1983 action was removed, the 120-day statutory period had expired, and petitioner's ability to comply with the notice of claim requirement depended on his establishing the absence of prejudice to the defendants.

Moreover, petitioner alleged that the investigation in this case was part of a racially-motivated conspiracy to cover up respondents' initial wrongdoing and interfere with his access to the state courts in violation of 42 U.S.C. § 1985(2). See Plaintiff's Second Amended Complaint, paras. 21; 29-33; 35; 52; 54-55 (J.A. 15-19; 23-24).

<sup>13</sup>The petitioner could not have served notices on nine of the ten respondents within the 120-day statutory period because petitioner only learned the identity of these respondents after the litigation had begun. See Complaint, para. 3 (naming unknown "Doe" defendants). Although this might justify a late filing in some jurisdictions, see *supra* note 3, the Wisconsin notice of claim requirement does not contain a "good cause" exception but only permits late filing when claimants prove the absence of prejudice to the defendants.

<sup>14</sup>The Wisconsin Supreme Court has characterized as "unseemly" the tactic of attorneys holding back notice of claim defenses so that plaintiffs can no longer remedy their failure to give notice. See *Figgs v. City of Milwaukee*, 121 Wis.2d 44, 56, 357 N.W.2d 548, 555 (1984). The facts of the present case illustrate how defendants can skillfully use notice of claim requirements to ambush plaintiffs and why that practice has come under criticism from commentators. See, e.g., J. Fordham, *Local Government Law* 1162 (rev. ed. 1975) (noting the unfairness of "sit[ting] out" the filing period").

Finally, to demonstrate the simplicity and reasonableness of the notice of claim requirement, respondents have drafted a letter that petitioner could have "sent . . . to the city clerk sometime between July 4, 1981 and early November 1981 to comply with both subsections of the claim statute." Brief for Respondents at 9. Therefore, ironically this "simple letter," *id.* at 10, *clearly* fails to meet the requirements of the notice of claim statute. As respondents point out, in actions against municipal employees, notices of claim must be served on *both* the municipality and the employees. *Id.* at 5-6. The proposed letter, however, is addressed *only* to the city and thus does not provide proper statutory notice to the respondents, all of whom are City of Milwaukee police officers.

The inability of the respondents to draft an adequate notice illustrates the weakness of their argument concerning the simplicity of the requirement that they claim is routinely followed. Regardless of the motivation of its drafters, the Wisconsin notice of claim requirement operates as a trap for plaintiffs and frustrates access to state courts. Thus, prospective plaintiffs who fail to file statutory notices within 120 days of an incident will rarely risk filing § 1983 claims in state court if they have an available federal forum.<sup>15</sup>

<sup>15</sup>Respondents also assert that the notice of claim requirement encourages settlements, but cases are no more likely to settle early in the claims process than in the early stages of litigation. More important, there is nothing in the record to demonstrate that the goal of settling cases is met in § 1983 cases involving police misconduct. In fact, prior to trial, petitioner's counsel alleged and offered to prove

that it is an absolute sham to talk about filing a claim before going into court in a police brutality case. Your Honor, I don't know that the City has ever, in its history, settled a police brutality claim without . . . the case being filed with the court. I don't know what good it would have done.

Tr. 27 (Feb. 25, 1985).

At trial, Alderman Nabors, whose testimony was not transcribed but was referred to in the hearing before Judge Landry, see Tr. 167 (Mar. 8, 1985), testified that cases (involving police

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**C. Any Public Purposes Served By Notice Of Claim Requirements Are Outweighed By The Federal Interest In Preserving § 1983 Plaintiffs' Access To State Courts.**

In defending the application of notice of claim requirements to state court § 1983 actions, respondents identify a number of public purposes served by these requirements. The City Management amici further discuss these concerns and argue that it is inappropriate for federal law to interfere with the procedures followed by the state judiciary. These concerns, however, are outweighed by the strong interest in respecting the congressionally established system of concurrent jurisdiction over § 1983 claims.<sup>16</sup>

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misconduct) do not settle during the claims process, and that he could not recall a case that settled without the filing of a civil action. Given the trial court's conclusion that the notice of claim requirement did not apply to § 1983 actions, it made no findings on this issue.

In his Brief to the Wisconsin Supreme Court, petitioner made the following representation: "Police brutality cases, without fault[ing] . . . anyone, traditionally do not settle. The rare settlements occur on the eve of trial or . . . after litigation is commenced. Settlements in police force cases of this type do not occur through a common council claim process." Response Brief of Plaintiff-Appellant at 32 n.28 (Nov. 5, 1986).

Petitioner then suggested that if the Wisconsin Supreme Court had "any doubt about these factual assertions" concerning the practice of the City of Milwaukee in settling police cases, the court should remand the case to give the plaintiff "an opportunity on remand to prove these matters before the trial court." *Id.* The Wisconsin Supreme Court did not accept petitioner's suggestion but ordered the dismissal of his § 1983 action.

<sup>16</sup>In relying on the traditional justifications for notice of claim requirements, respondents fail to come to grips with their apparent concession that notice of claim requirements are inapplicable in federal court § 1983 litigation. Brief for Respondent at 24. The purposes advanced for these requirements, however, stand little chance of being achieved if they apply only in state courts, but Congress is the only appropriate body to adopt a notice of claim requirement for all § 1983 litigation. *Cf. Patsy v. Board of Regents of the State of Fla.*, 457 U.S. 496, 513-15 (1982).

The state interest in applying notice of claim requirements to § 1983 actions is seriously exaggerated by the City Management amici who identify notice of claim statutes from 37 states and the District of Columbia to demonstrate that such provisions are a "near universal response" to litigation against governmental entities. City Management Amici Brief at 26 & 1a-2a. Despite the widespread use of notice of claim requirements in traditional tort litigation, states have shown little interest in applying these requirements to § 1983 claims.<sup>17</sup> Most of the statutes cited use general phrases to define their coverage (i.e., "all claims," "damages," "negligence," "personal injury," or "tort"), and it is unclear whether they apply to § 1983 claims. Only one of the statutes cited is expressly applicable to federal claims<sup>18</sup> despite the fact that these provisions "have been the focus of much recent legislative scrutiny." City Management Amici Brief at 3a. Thus, it appears that state legislatures have exhibited virtually no interest in applying notice of claim requirements to § 1983 or other federal claims.

One of the strengths of our system of judicial federalism is the double source of protection provided for fundamental rights. Most litigation in this country takes place in the state courts, and the state judiciary is no stranger to federal law. Indeed, state courts entertain

<sup>17</sup>For example, five of the cited notice of claim statutes apply only to traditional areas of municipal liability such as the maintenance of highways and bridges. See Ky. Rev. Stat. Ann. § 411.110 (Baldwin 1979); Mich. Comp. Laws Ann. § 691.1404 (West 1987); Mo. Ann. Stat. § 77.600 (Vernon 1987); R.I. Gen. Laws § 45-15-9 (1980 & Supp. 1987); Vt. Stat. Ann. tit. 19, § 1373 (1968). In addition, Tennessee has repealed its notice of claim requirement, see Tenn. Code Ann. § 29-20-301 (1980), *repealed by*, 1987 Tenn. Pub. Acts, ch. 405, § 7; the North Carolina statute cited is only applicable to claims against state agencies made to the Industrial Commission, see N.C. Gen. Stat. § 143-291 (1983); and Arkansas completely immunizes political subdivisions from "liability for damages" but authorizes a claims process for settling claims. See Ark. Stat. Ann. §§ 21-9-301 & 21-9-302 (1987).

<sup>18</sup>See Colo. Rev. Stat. §§ 24-10-109 & 24-10-119 (Supp. 1987).

many federal claims and play an important role in enforcing federal law under the system of concurrent jurisdiction established during our first century. See *Claflin v. Houseman*, 93 U.S. 130 (1876); *Houston v. Moore*, 18 U.S. (5 Wheat.) 1 (1820).<sup>19</sup>

State courts have concurrent jurisdiction over § 1983 actions, and the increase in state court § 1983 litigation should be encouraged. That development, however, will be arrested if state courts can interpose state policies that deviate from the federal definition of § 1983 or that burden the litigation of § 1983 claims.<sup>20</sup> State courts may apply state policies in litigation involving state law, see *Martinez v. California*, 444 U.S. 277, 280-83 (1980) (upholding application of state immunity to state claim), but when federal causes of action are heard in state courts, that freedom is appropriately limited.

<sup>19</sup>Congress recognizes the importance of concurrent jurisdiction in another way. When plaintiffs file § 1983 actions in state courts, defendants may sometimes believe that state policies are inconsistent with § 1983 or its purposes. In such cases, they may argue for the application of federal rules or, if they believe the state courts will not be receptive to their arguments, may avail themselves of the congressionally-authorized procedure for vetoing the plaintiffs' choice of the state courts and remove the action to federal court under 28 U.S.C. § 1441 (a), the general federal removal statute. Defendants should not, however, be able to undercut plaintiffs' choice of the state courts by expecting state courts to refuse to apply essential attributes of the federal cause of action.

The ability of state court § 1983 defendants to remove cases to federal court is a protection that is not made available to defendants in state court FELA cases. See 28 U.S.C. § 1445(a).

<sup>20</sup>The decision below, if permitted to stand, will give states a clear signal that they may impose notice of claim requirements in § 1983 litigation. That message would undoubtedly reach not only those states that purport to have flexible notice of claim requirements but also those states that strictly apply notice of claim requirements, especially their time limits. Thus, this Court could be forced to examine whether notice of claim statutes with different features are consistent with federal law. Cf. *Patsy v. Board of Regents of the State of Fla.*, 457 U.S. 496, 513-15 (1982) (burden of developing acceptable exhaustion requirements supports deferring to Congress).

#### D. State Courts Have Had Jurisdiction Over § 1983 Actions Since 1871.

The City Management amici contend that state courts did not obtain jurisdiction over § 1983 cases until the adoption of the Judicial Code of 1911. City Management Amici Brief at 15 & n.15. That suggestion, even if accurate, does not help respondents because state courts entertaining § 1983 actions would still be under the same obligation to refrain from applying state policies that are either inconsistent with the definition of the § 1983 cause of action or that burden the litigation of § 1983 claims. In any event, as demonstrated below, state courts have had jurisdiction over § 1983 actions since 1871.

Section 1 of the Civil Rights Act of 1871, 17 Stat. 13, not only created a federal remedy but also authorized federal courts to entertain the new civil action. Nonetheless, the language of § 1 demonstrates that Congress did not intend to make federal court jurisdiction exclusive. Section 1983 was patterned after the criminal sanction in § 2 of the Civil Rights Act of 1866, ch. 31, 14 Stat. 27, see *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 162 (1970), over which federal court jurisdiction was explicitly made exclusive. See Civil Rights Act of 1866, *supra*, § 3. Thus, Congress knew how to create exclusive federal jurisdiction but did not do so in § 1. Rather, it simply provided for "such proceedings to be prosecuted in the several district or circuit courts of the United States," saying nothing about the issue of exclusivity.<sup>21</sup>

Moreover, in the 1874 codification of the United States statutes, Congress separated the remedial and jurisdictional provisions of § 1 of the Civil Rights Act of 1871 and placed different formulations of the latter in two separate

<sup>21</sup>The presumption of concurrent jurisdiction has its roots in the Judiciary Act of 1789 and the approach adopted by the First Congress in vesting federal courts with jurisdiction. See *Houston v. Moore*, 18 U.S. (5 Wheat.) 1, 26 (1820) (relying on Federalist No. 82 and the Judiciary Act of 1789 to conclude that in the opinion of Congress "it was not sufficient to vest an exclusive jurisdiction . . . merely by a grant of jurisdiction generally").

provisions applicable to the district and circuit courts respectively. *See* Rev. Stat. §§ 563 & 629. *See also* *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 608-09 (1979). Neither of these provisions, however, made federal court jurisdiction exclusive.<sup>22</sup> *See also* Rev. Stat. § 711 (enumerating areas of exclusive federal court jurisdiction).

The Civil Rights Act of 1871 contained jurisdictional provisions because of the absence of a general federal question jurisdictional provision until 1875. Act of Mar. 3, 1875, ch. 137, § 1, 18 Stat. 470. The 1875 Act, however, further supported the regime of concurrent jurisdiction by providing that "[T]he circuit courts of the United States shall have original cognizance, concurrent with the courts of the several States, of all suits [meeting the jurisdictional amount] and arising under [federal law]." *Id.* *See also* *Mondou v. New York, N.H. & H. R.R.*, 223 U.S. 1, 56 (1912); *Robb v. Connolly*, 111 U.S. 624, 637 (1884). Finally, in 1876, in *Clafin v. Houseman*, 93 U.S. 130 (1876), this Court relied on its earlier decision in *Houston v. Moore*, *supra*, and reinforced the principle of concurrent jurisdiction that has supported state court jurisdiction over § 1983 actions since 1871.<sup>23</sup> *See also* *Giles v. Teasley*, 193 U.S. 146 (1904) (entertaining a § 1983 case arising from the state courts).

<sup>22</sup>The 1874 codification also created a subclass of § 1983 claims for which only state courts had jurisdiction. *Cf. Maine v. Thiboutot*, 448 U.S. 1, 8 n.6 (1980).

<sup>23</sup>Although exclusive federal court jurisdiction may exist when the exercise of state court jurisdiction is incompatible with federal interests, *see Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 477-78 (1981), there is no such incompatibility between state court § 1983 jurisdiction and federal interests. Moreover, the legislative history of § 1983 does not support the conclusion that Congress intended to preclude state courts either from entertaining the new remedies or from using their pre-existing remedies to address the unlawful conduct Congress sought to curb. *See Patsy v. Board of Regents of the State of Fla.*, 457 U.S. 496, 506-07 (1982).

## II. THERE IS NO CLEAR STATEMENT RULE OF STATUTORY CONSTRUCTION THAT REQUIRES CONGRESS TO STATE EXPLICITLY WHICH REMEDIAL ATTRIBUTES OF THE § 1983 CAUSE OF ACTION ARE APPLICABLE IN STATE COURTS.

The City Management amici argue for the adoption of a clear statement rule that would permit the application of state notice of claim requirements to state court § 1983 litigation because Congress has not explicitly prohibited state courts from applying such policies. Such a novel and far-reaching rule of statutory construction, however, is inconsistent with the nature of the § 1983 remedy.<sup>24</sup> Moreover, this Court has never applied a clear statement rule to resolve questions involving either the exercise of state court jurisdiction over federal claims or the remedial policies that apply when state courts entertain federal causes of action.<sup>25</sup>

### A. The Use Of A Clear Statement Rule Is Inconsistent With The Nature Of The § 1983 Cause Of Action.

The use of a clear statement rule of statutory construction in the present case would be inconsistent with a number of fundamental features of § 1983.

<sup>24</sup>In *Mellinger v. Town of West Springfield*, 401 Mass. 188, 196, 515 N.E.2d 584, 589 (1987), the Supreme Judicial Court of Massachusetts adopted a clear statement rule of statutory construction under which it refused to apply the Massachusetts notice of claim requirement absent "a clear legislative statement that § 1983 claimants must comply" with the state requirement.

<sup>25</sup>This Court has used clear statement rules in cases involving the eleventh amendment in which it is unwilling to presume that Congress made states amenable to suit in federal court absent an explicit statement to that effect. *See, e.g., Welch v. State Dep't of Highways and Public Transp.*, 107 S.Ct. 2941, 2947-48 (1987); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985). Likewise, this Court has used clear statement rules in pre-emption cases, although it has not insisted on clear statements and has found pre-emption based on the scheme of federal regulation. *See California Federal Sav. and Loan Ass'n v. Guerra*, 107 S.Ct. 683, 689 (1987).

Section 1983 is a sparsely worded statute that does not explicitly address many of the more important issues that have arisen in § 1983 litigation. Congress enacted § 1983 because of the inadequacy of existing state remedies, and this Court has broadly construed § 1983 in areas involving fundamental state concerns despite the absence of clear statements by Congress. See, e.g., *Forrester v. White*, 108 S.Ct. 538 (1988); *Pulliam v. Allen*, 466 U.S. 522 (1984); *Monell v. Department of Social Servs.*, 436 U.S. 658 (1978); *Smith v. Wade*, 461 U.S. 30 (1983). These decisions apply equally in state and federal courts, and this Court has never imposed a clear statement rule on § 1983 under which state policies would control unless Congress explicitly rejected them.<sup>26</sup>

Moreover, any search in the legislative history for a clear expression of congressional intent on the policies applicable in state court § 1983 litigation is bound to be fruitless. The 42d Congress was primarily concerned with aspects of the proposed Civil Rights Act of 1871 that were more controversial than the civil remedy in § 1, see *Monell*, 436 U.S. at 665, and it is not surprising that there are no detailed discussions of the policies to be applied by state courts entertaining § 1983 actions. Nonetheless, the 42d Congress did not preclude state courts from addressing the evils the legislation was designed to curb, see *Patsy v. Board of Regents of the State of Fla.*, 457 U.S. 496, 505-07 (1982), and it is likely that had members of the 42d Congress expressly addressed these issues they would have expected the new civil remedy to be construed similarly in state and federal courts.<sup>27</sup>

<sup>26</sup>These constructions of § 1983 are more consistent with Representative Shellabarger's plea for a liberal construction to achieve the Act's remedial purposes, see *Monell*, 436 U.S. at 684 (quoting Rep. Shellabarger), than with a clear statement rule.

<sup>27</sup>This Court has adopted a similar policy with regard to actions filed against federal officials, see *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), and has developed § 1983 and *Bivens* actions similarly. See *Harlow v. Fitzgerald*, 457 U.S. 800, 818 n.30 (1982) (immunity policies). See also *Chin v. Bowen*, 833 F.2d 21, 23 (2d Cir. 1987) (statutes of limitations).

Given the nature of § 1983 as a supplementary federal remedy not dependent on state remedies, a decision permitting state courts to apply their own remedial policies to § 1983 would be anomalous.<sup>28</sup> See *Burnett v. Grattan*, 468 U.S. 42, 55 n.18 (1984). The City Management amici appear to recognize this, and they concede that their proposed clear statement rule should not apply to issues involving damages, remedies, the choice of statutes of limitations, and attorney fees. City Management Amici Brief at 21-22. Petitioner agrees that federal standards should govern these attributes of § 1983 in both state and federal courts and suggests that the proposed clear statement rule is nothing more than an ad hoc rule designed only to produce a desired result in the present case.<sup>29</sup>

#### **B. The Use Of A Clear Statement Rule Is Inconsistent With This Court's Approach To State Court Litigation Of Federal Claims.**

The proposed clear statement rule is also inconsistent with this Court's decisions requiring state courts to entertain federal causes of action despite the absence of clear congressional statements obligating state courts to hear

<sup>28</sup>The case for requiring clear legislative statements by Congress is far stronger when this Court has put Congress on notice as to the rules of statutory construction, cf. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 374-78 (1982) (implied rights of action), than when this Court is addressing a statute enacted more than a century ago.

<sup>29</sup>The proposed clear statement rule could not be logically confined to state court § 1983 claims and would apply not only to other surviving Reconstruction-era civil rights actions but also to a wide range of modern civil rights and other actions over which state courts have jurisdiction. See, e.g., 29 U.S.C. § 216(b) (Equal Pay Act); 29 U.S.C. § 626(c)(1) (Age Discrimination in Employment Act); 42 U.S.C. § 3612(a) (Title VIII of the Civil Rights Act of 1964). See also *Miller v. Woods*, 148 Cal. App.3d 862, 196 Cal. Rptr. 69 (1983) (§ 504 of the Rehabilitation Act of 1973).

such federal actions. In *Mondou v. New York, N.H. & H. R.R.*, 223 U.S. 1 (1912), the Court required state courts to entertain FELA actions. The federal statute expressly provided for state court jurisdiction but did not address whether it was mandatory. In concluding that state courts must take jurisdiction over FELA actions, this Court noted that "[t]he existence of the jurisdiction creates an implication of duty to exercise it, and that its exercise may be onerous does not militate against that implication." *Id.* at 58. Connecticut had disagreed with the policies underlying FELA, but this Court dismissed this disagreement as a basis for refusing to hear FELA cases as "inadmissible." *Id.* at 57. Similarly, in *McKnett v. St. Louis & San Francisco Railway*, 292 U.S. 230 (1934), this Court prohibited the Alabama state courts from refusing to entertain FELA actions between nonresidents on out-of-state accidents even though the Alabama courts heard similar transitory actions under state law as well as non-transitory FELA actions.<sup>30</sup> Finally, in *Testa v. Katt*, 330 U.S. 386 (1947), this Court held that state courts could not rely on a policy of refusing to entertain penal statutes of other jurisdictions as a basis for refusing to entertain federal claims. The *Testa* Court pointed to the fact that the Rhode Island courts in question entertained the "same type of claim(s)" under state law, *id.* at 394, but most of the opinion addresses the general duty of state courts to entertain federal claims apart from their obligation to refrain from discriminating against federal claims. In any case, regardless of the breadth of *Testa*, this Court clearly required state courts to entertain a fed-

<sup>30</sup>Although Justice Brandeis in *McKnett* characterized the discriminatory treatment of federal claims by the Alabama courts as being inconsistent with the federal Constitution, 292 U.S. at 233, he did not cite any specific constitutional provision and appears to have been referring to the obligation of the state courts under the Supremacy Clause. The principle of nondiscrimination used in *McKnett* and *Mondou*, however, is clearly broader than the specific language of FELA and represents a rule of statutory construction under which state courts are obligated to entertain federal causes of action in the face of congressional silence.

eral cause of action despite the absence of any explicit congressional statement to that effect.<sup>31</sup>

This Court has also regularly reviewed the obligation of state courts entertaining federal causes of action to apply the entire federal cause of action with all its remedial attributes. These cases often raise issues that intimately affect the operation of the state courts, but this Court has resolved these cases without resorting to clear statement rules of statutory construction. For example, this Court has dealt with such sensitive matters as the division of responsibility between the judge and the jury, *see Dice v. Akron, C. & Y. R.R.*, 342 U.S. 359 (1952); the directed verdict standard, *see Wilkerson v. McCarthy*, 336 U.S. 53 (1949); the burden of proof on releases, *see Garrett v. Moore-McCormack Co.*, 317 U.S. 239 (1942); and pleading requirements, *see Brown v. Western Ry. of Ala.*, 338 U.S. 294 (1949), and has required state courts to reject their familiar state "procedural" policies.

Much of this Court's jurisprudence considering the policies to be followed by state courts entertaining federal causes of action was developed in FELA litigation, and petitioner has relied heavily on these cases. Although

<sup>31</sup>This Court has treated jurisdictional policies differently from policies that apply when states open their courts to federal actions and has permitted states to apply venue and forum non conveniens policies to exclude subclasses of FELA actions from their courts, *see Missouri ex rel. Southern Ry. v. Mayfield*, 340 U.S. 1 (1950); *Douglas v. New York, N.H. & H. R.R.*, 279 U.S. 377 (1929), and to regulate which state courts could hear FELA actions. *See Herb v. Pitcairn*, 324 U.S. 117 (1945). In upholding these refusals by state court to exercise jurisdiction over subclasses of FELA actions, this Court relied on the strength of the state interest in the administration of their judicial systems and not simply on the fact that the state policy applied to both state and federal causes of action. In each case there was also an alternative state court that could have heard the federal action. The present case, on the other hand, does not involve a refusal to exercise jurisdiction over federal actions, and there is no alternative state court. Moreover, the policy reasons offered in support of notice of claim requirements involve governmental concerns that are unrelated to the actual operation of the state courts or the conduct of litigation.

there are important differences between FELA and § 1983 litigation,<sup>32</sup> the statutes creating these rights of action were both adopted by Congress because of concerns about the adequacy of state remedies. State law provided railroads that were negligent with a broad range of immunity and other defenses, *see* G. Calabresi, *A Common Law for the Age of Statutes*, 32-33 (1982), and Congress created the Federal Employers' Liability Act and authorized actions in both state and federal courts.

Likewise, the Congress that enacted the Civil Rights Act of 1871 was vitally concerned about the adequacy of state remedies and created a supplementary federal remedy for claims involving violations of the Constitution. The City Management amici argue that the Civil Rights Act of 1871 created *only* a supplementary forum, (Brief at 16) but had Congress intended to create only a supplementary forum, it could have done so simply by adopting a statute that provided original or removal jurisdiction. *See* Civil Rights Act of 1866, ch. 31, § 3, 14 Stat. 27 (removal jurisdiction). Rather, Congress not only opened the federal courts to these actions but also created a new federal remedy to enforce the fourteenth amendment despite the availability of state common law remedies for redressing the identical conduct. *See Monroe v. Pape*, 365 U.S. 167, 196 (1961) (Harlan, J., concurring).

<sup>32</sup>FELA was enacted to regulate the private conduct of railroads, while § 1983 was enacted to enforce federal constitutional rights against defendants acting under color of state law. That distinction, however, makes the case for a clear statement rule for FELA cases even stronger than the case for such a rule for § 1983 claims. In FELA, Congress moved into an area of tort law traditionally reserved to the states, *cf. Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), but was able to do so because of the powers granted the federal government under the Commerce Clause. Section 1983, on the other hand, was enacted pursuant to the powers given Congress by the fourteenth amendment. *See Mitchum v. Foster*, 407 U.S. 225, 238 (1972). Given these different sources of legislative authority, the case for a clear statement rule when state courts entertain FELA claims is considerably stronger than when state courts entertain § 1983 claims.

The imposition of a clear statement requirement on Congress before rejecting notice of claim requirements would undercut the increasingly important role of state courts in entertaining § 1983 claims. It would also require the reversal not only of *El Paso & Northeastern Railway v. Gutierrez*, 215 U.S. 87 (1909), which rejected the application of a notice of claim requirement to a state court FELA action,<sup>33</sup> but also of many other cases in which this Court required state courts entertaining federal claims to abandon state policies despite the absence of any clear statements by Congress.<sup>34</sup>

## CONCLUSION

For these reasons, the judgment and opinion of the Wisconsin Supreme Court should be reversed.

Respectfully submitted,

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<sup>33</sup>Respondents claim that *Gutierrez* turns on Congress's plenary power over the territories by asserting that the Court "noted that it would have upheld the application of a claim statute had it been passed by a state as opposed to a territory." Brief for Respondents at 18. This Court made no such statement and this narrow reading of *Gutierrez* is simply wrong. *Gutierrez* was a FELA case that began in the Texas courts, but the Texas courts applied the law of the jurisdiction (including the territory) in which the accident took place. In concluding that federal law would "supersede" the territorial notice of claim requirement, 215 U.S. at 93, this Court neither expressly stated nor implied that it would reach a different result had Texas been applying a Texas notice of claim requirement and not one incorporated into Texas law through the Texas choice of law policy. Rather, this Court refused to allow the Texas courts to require compliance with an otherwise applicable notice of claim requirement in a federally created action despite the absence of any clear congressional statements barring the use of notice of claim requirements.

<sup>34</sup>*See, e.g., supra*, at 23.